(4)

No. 06-1645

IN THE

Supreme Court of the United States

MARIE INEZ CRAVENS, et al,

Petitioners,

v.

CITY OF LA MARQUE, TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. The City's Arguments Fall Outside the Correct Standard of Review and Therefore Should Be Rejected.

The City argues the facts in the light most favorable to the City. These self-serving arguments fall outside the correct standard of review, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002), and should be rejected out of hand when evaluating the pleadings under Fed. R. Civ. P. 12 (b)(6).

A.
The pleaded facts are sufficient to support a "state-created danger" theory of liability.

Viewing the facts in the light most favorable to Petitioners, a reasonable mind can only conclude that the cause of action is properly pleaded. In fact, the district court found the pleaded facts were sufficient to support a "state-created danger" theory of liability. The appeals court avoided the issue by making a pure legal ruling: the "state-created danger" theory did not exist in the circuit. Therefore, according to the appeals court, there could be no liability for the City as a matter of law regardless of the pleaded facts.

The legal issue for this Court to decide is whether the "state-created danger" theory should be recognized throughout the land or abolished. The City never addresses this legal issue. Instead, it misses the point. It argues the facts in its favor and encourages the Court to ignore the legal conflict in the circuits. Petitioners urge the Court to resolve the legal conflict one way or the other and not be distracted by the City's subterfuge.

Cravens' due process entitlement to protection arises from the state's creation of the danger; to wit: cutting-off his private source of aid. To the extent the state creates a specific danger for a specifically identified individual within its control "on the scene," Castle Rock, *infra,* at 760, the state has an obligation to ameliorate that danger. In this case, the danger could be eliminated by returning Cravens to his zone of private safety or establishing a state-created zone of safety. For example, the officer could have taken Cravens into custody for purposes of providing medical attention, taken him to jail to keep him from driving, called him a cab, driven him home, confirmed Cravens' cousin would not allow Cravens to drive. There are many options, but one duty: protect Cravens from the danger created by the police. If protection is carried out via arrest, so be it. However, arrest is not the only state-created solution. Entitlement to arrest is a red herring. The issue is entitlement to protection.

The "no entitlement to have another arrested" holding in Town of Castle Rock, Colo. v. Gonzalez, 545 U.S. 748 (2005) is inapposite. There, a woman sought police protection from a private actor not on the scene and whose whereabouts was unknown. She claimed that she had a non-discretionary right to have that elusive private actor arrested. In this case, Cravens argues he had a right to be protected from the danger created by the police. Once the police arrived, the private actors were arguably either intimidated from carrying out their plan of protection or trusted the police to properly perform the duty to render proper aid under the circumstances. Once the police created the danger by cutting-off aid, the police had a duty to properly protect Cravens from that danger. Under these circumstances, even if the officer had discretion regarding arrest, he did not have discretion when it came to protecting Cravens from the danger the officer created.

B.
The pleaded facts are sufficient to support a "special relationship" theory of liability

Petitioners ask the Court to extend the DeShaney "special relationship" duty to the extent of the state's degree of control (via police power) over a specific individual being detained "on the scene." Castle Rock, *infra,* at 760.

Out of deference and limited authority, the district court was not willing to so extend DeShaney.

The appeals court never commented on the issue.

Petitioners ask the Court to ultimately hold that Ontiveros' affirmative act of detaining Cravens for questioning was sufficient to trigger a duty to render aid. Ontiveros had a duty to either return Cravens to his zone of safety or create an alternate zone of safety. This Court may ultimately hold that Cravens had to be formally arrested before any duty to protect would arise. However, DeShaney did not draw that bright line. The requested extension is properly within the province of this Court and the words of Chief Justice Rehnquist. The state has a duty to protect when it "*puts some other similar restraint on an individual's personal liberty by the affirmative exercise of state power such that he cannot act on his own behalf.*" DeShaney at 199-200. The detention here should satisfy the "similar restraint" requirement. Cravens could not act on his own behalf when the state detained him. He was dependent upon the good will of his private actors at first. Then, when detained, he was dependent upon the good will of the state actor Ontiveros. Since the detention displaced the private source of aid, Ontiveros had an obligation to properly address Cravens' needs at that point.

Only this Court can and should properly extend DeShaney to these facts.

C.
The pleaded facts are sufficient to support direct liability against the City.

Petitioners have adequately pleaded facts under which the City could be held directly liable for the conduct of Ontiveros. We all are bound to view those facts in the light most favorable to Petitioners. The City chooses to ignore this standard. Petitioners respectfully remind this Court that even in a worst case scenario, arguably the City ratified the conduct of Ontiveros through no disciplinary action for two months and only acted once the City received notice of claim. The City fired Ontiveros on the very day the City received notice of claim. The district court and the appeals court ignored the ratification theory. The City ignores it in its Brief in Opposition.

CONCLUSION

This case is worthy of the Court's consideration. Petitioners pray the Court grant the Petition, ultimately resolve the conflict in the circuits over DeShaney, reverse the courts below and remand the case for trial consistent with this Court's opinion. "Thus Always to Tyrants."[1]

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[1] The Great Seal of Virginia features the Roman goddess Virtus standing over a defeated opponent. She represents the virtues of heroism, righteousness, freedom, and valor. She stands in a classical victor's pose over a fallen tyrannical foe, whose crown lies on the ground. The state's motto "Sic Semper Tyrannis" ("Thus Always to Tyrants") appears at the lower edge. The seal was approved at Virginia's 1776 Constitutional Convention.

Respectfully submitted,

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